

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURTIS LANE MIDDLETON,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 265143
Oakland Circuit Court
LC No. 05-202095-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of accosting a child for immoral purposes, MCL 750.145a. Defendant was sentenced as a second habitual offender, MCL 769.10, to eighteen months to six years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first asserts that he was denied the effective assistance of counsel when counsel failed to have him testify, failed to call his brother to testify, and failed to obtain a competency evaluation. We disagree. To establish a denial of effective assistance of counsel, a defendant must prove that "counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). This deficiency must have prejudiced the defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy and that an attorney's conduct during the course of a trial falls within the wide range of reasonable professional assistance. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Riley (On Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), habeas gtd 388 F Supp 2d 789 (ED Mich, 2005).

Although a criminal defendant has a constitutional right to testify, if such defendant acquiesces in his attorney's decision that he not testify, this right is deemed waived. US Const Am XIV; Const 1963, art 1, §§ 17, 20; *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). Counsel's decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only where it deprives the defendant of a substantial defense.

Although defendant objects that counsel did not place defendant's waiver of his right to testify on the record, there is no indication that defendant did not understand that he could testify if he wanted to. Nor is there any indication that he rejected counsel's advice not to testify. Further, while defendant's record contains no crimes of dishonesty or moral turpitude that would have a bearing on his credibility at trial, counsel's decision was reasonable given the inconsistent statements defendant made to Officer Harding about defendant's knowledge of the wrapped condom. Further, counsel's decision not to have defendant testify did not deny defendant the opportunity of presenting a substantial defense. On appeal, defendant claims his testimony and his brother's testimony would have established that the girls came to his house to drink and party and might have established that the girls framed him. Defendant claims that while the girls were visiting his home that day, they could have found the condom on his kitchen table and put it in the purse belonging to Michelle Lanthier, one of the girls visiting defendant's home that afternoon. Defendant asserts that the condom was on the table because he had emptied his pockets. However, such a theory would have been undermined by cross-examination of defendant regarding his statement to Officer Harding.

Counsel's failure to call defendant's brother, Kent Middleton, to testify was sound trial strategy. Defendant contends on appeal that Kent's testimony could have cast doubt on the girls' credibility by establishing that the girls came over to defendant's house to party and drink beer. Defendant claims Kent would have testified that on the day at issue the girls drank an entire case of beer rather than the one beer the girls testified to drinking. As the evidence establishes that Kent gave the girls the beer, watched a movie with them while they drank the beer, and acted in a way that one of the girls testified was sexually offensive, it was reasonable for counsel to decline to call Kent as a witness.

Defendant also contends that he was denied effective assistance of counsel because his trial attorney failed to request a competency hearing. We disagree. A defendant is presumed competent to stand trial and the question of the competence of an accused is appropriately presented for a hearing where evidence of incompetence appears. MCL 330.2020(1); *People v Matheson*, 70 Mich App 172, 180; 245 NW2d 551 (1976). It is true that defendant is bipolar and manic-depressive. But, defense counsel had previously requested a competency evaluation performed on defendant in another case pending against defendant, and in this evaluation, defendant was found competent to stand trial. In light of this finding, the parties in this case stipulated that defendant was competent to stand trial. Therefore, counsel was not ineffective in failing to request a competency evaluation here.

Defendant next asserts that he was denied a fair trial by the prosecutor's improper closing remarks. We disagree. Because defendant failed to preserve this issue by objecting at trial to the prosecutor's allegedly improper closing remarks, our review is limited to plain error that affects defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

This Court decides claims of prosecutorial misconduct on a case-by-case basis by examining the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Thus, we evaluate prosecutorial comments as a whole, in light of the defendant's arguments and the relationship such comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may argue that certain evidence is uncontradicted. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501

(2003). But, a prosecutor may not attempt to shift the burden of proof by commenting on a defendant's failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). No error requiring reversal exists where a curative instruction could have alleviated the prejudicial effect of the prosecutor's comment. *Callon, supra*, p 329.

In his closing remarks the prosecutor stated, "there's been no evidence to show that anyone else but the defendant could have put the condom in that purse" Defendant contends that this remark improperly shifted the burden to defendant to prove his innocence and impinged on defendant's Fifth Amendment right to remain silent. Defendant relies on *People v Green*, 131 Mich App 232; 345 NW2d 676 (1983). We find that *Green* is distinguishable from the instant case. In *Green*, the prosecutor put forth eleven questions for defense counsel to resolve in counsel's closing remarks if the defendant were innocent of the charged crime. *Green, supra*, pp 234-236. The *Green* Court held that the prosecutor's calculated form of questioning implied that the defendant must explain the evidence and prove something, thereby impermissibly shifting the burden of proof. *Id.* at 237.

Here, the prosecutor's brief remark did not shift the burden of proof to defendant, but rather, highlighted the evidence presented at trial. Unlike *Green*, the prosecutor in this case did not pose questions in his closing remarks nor imply that defendant's guilt hinged upon defense counsel explaining the evidence to prove defendant's innocence. Rather, he discussed the elements of the charged offense and reviewed the evidence admitted at trial, noting that there was no evidence that anyone else could have put the condom in the purse. The trial court repeatedly informed the jury that attorneys' arguments are not evidence and the trial court instructed the jury prior to the closing arguments that the prosecution must prove defendant's guilt beyond a reasonable doubt. We conclude that the prosecutor's comment was proper in this context. Furthermore, any prejudicial effect could have been eliminated by a curative instruction. *Callon, supra*, p 329.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White